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No. 90-1973

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ERBAUER CONSTRUCTION CORPORATION,

Petitioner,

v.

PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by petitioner rest upon a flawed premise. The courts below did not determine whether petitioner has a remedy under the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner simply asserts that it has no such remedy in order to present the following questions for review:

1. Does the Employee Retirement Income Security Act of 1974 (ERISA) preempt state law claims of an employer, who is not empowered to bring a civil action under ERISA?

2. Does ERISA preemption of an employer's state law claims, without an alternative federal remedy, deny the employer's constitutional right of access to the courts?

These questions were not decided below and are not properly presented here.

LIST OF PARTIES

Pan American Life Insurance Company is a parent corporation, all subsidiaries of which are wholly owned.

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PAN AMERICAN LIFE INSURANCE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Pan American Life Insurance Company (Pan American) respectfully requests that this Court deny the petition for writ of *certiorari*, seeking review of the judgment of the Supreme Court of Texas in this case. The opinion of the Supreme Court of Texas is reported at 805 S.W.2d 395 (Tex. 1991).

STATEMENT OF THE CASE

Petitioner Erbauer Construction Corporation (Erbauer) fails to raise any special or important reasons to warrant granting its petition for a writ of certiorari. The arguments made by Erbauer involve issues that are well-

settled and do not involve conflicting decisions between the United States courts of appeals or other state courts of last resort. Erbauer's claims do not implicate any federal constitutional provision. This statement will describe the pertinent facts omitted from Erbauer's statement of the case.

A. Factual Background

In February 1978, Erbauer established an employee benefit plan funded by a group policy of insurance issued by Pan American (PX 10).[1] The employee benefit plan provided, among other employee benefits, major medical disability benefits (PX 10). Under the terms of the employee benefit plan, an Erbauer employee who made written application for insurance for his dependents more than thirty-one days after the date of eligibility for the dependent's insurance could not obtain the insurance until the employee furnished satisfactory evidence of insurability of each dependent (PX 10).

Erbauer's personnel manager, Louise Hubbard was responsible for submitting employee benefit applications (S.F. 85-86). Hubbard would accommodate an employee who was late in seeking to insure his dependents by backdating the employee's enrollment card to the date he would have been eligible for the insurance (S.F. 676-77) The plan did not authorize backdating (PX 10). Hubbard

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[1] The record on appeal is designated "Tr." The trial testimony is designated "S.F." Exhibits are designated "PX" for plaintiff's exhibits and "PAX" for Pan American's exhibits. The Appendix to Erbauer's Petition is referred to as "A."

also dealt directly with Pan American in sending and receiving benefit applications, forms for processing claims and verification of coverage (S.F. 86, 102).

One of the Erbauer employees Hubbard accommodated by backdating his enrollment card was Dewey Gill. Hubbard prepared an enrollment card for Gill more than thirty-one days after the deadline for Gill to register his dependent daughter, Crystal, as a participant in the plan (PX 1, S.F. 130). Hubbard then backdated the effective date of Gill's enrollment card to a date that would make his daughter eligible for benefits (PX 1, S.F. 130). Pan American denied Gill's subsequent claim for employee benefits because it had no record that Gill or his daughter were enrolled in the plan or had submitted evidence of insurability (S.F. 685).

Erbauer was the only employer to establish or maintain the employee benefit plan involved in this case (PX 10). The employee benefit plan does not specifically designate the administrator (PX 10). In January 1980, Erbauer exercised its fiduciary power by changing the insurance company to fund its employee benefit plan (S.F. 270).

B. Procedural History

Dewey Gill sued Erbauer in Texas state court because Erbauer failed to comply with its responsibilities under the employee benefit plan in providing the required information for employees to be enrolled with insurance coverage (PAX 1, S.F. 666, 673, 685; Tr. 129). Erbauer, in turn, sued Pan American for its processing of Gill's claim (Tr. 114). Specifically, Erbauer alleged that Pan American wrongfully denied Gill's claim for employee benefits (Tr.

114). When asked by the trial court to explain his client's cause of action against Pan American, Erbauer's attorney admitted that Erbauer's claims were *identical* to Dewey Gill's claims except for the damages Erbauer sought to recover (S.F. 7) (emphasis added).

The court of appeals did not decide whether or not Erbauer had a remedy under the Employee Retirement Income Security Act of 1974 ("ERISA") in its opinion affirming the trial court's judgment in favor of Erbauer. Instead, the court of appeals incorrectly held that ERISA did not preempt Erbauer's claims because ERISA had not been pleaded as an affirmative defense at the trial court level (A. 6). Justice Camille Dunn correctly recited in her dissenting opinion that ERISA preemption in this case is jurisdictional and could not be waived (A. 26-29).

In reversing the judgments of the lower courts, the Texas supreme court held that Erbauer's claims relate to an employee benefit plan (A. 3). Erbauer's petition does not challenge this finding. The Texas supreme court further held ERISA preemption in this case is jurisdictional and could be raised for the first time on appeal (A. 3). Erbauer's petition also does not challenge this finding.

Erbauer bases all of its arguments on a single flawed premise: that the judgment of the Texas supreme court leaves Erbauer without any cause of action or remedy. Neither the Texas supreme court nor the court of appeals decided whether or not ERISA provides some type of remedy to Erbauer or the extent of that remedy. As Justice Dunn correctly outlined in her dissenting opinion in the court of appeals, the existence and extent of Erbauer's cause of action under ERISA is a question properly left to

a federal district court having jurisdiction over Erbauer's lawsuit (A. 24). Instead of refiling its suit in a court having jurisdiction, Erbauer filed this petition.

REASONS THE PETITION SHOULD BE DENIED

I. THIS IS AN ORDINARY ERISA PREEMPTION CASE RAISING NO SPECIAL OR IMPORTANT ISSUES.

Rule 10 of this court permits the discretionary writ of *certiorari* to be granted "*only* when there are special and important reasons therefor." (Emphasis added). This Court recently denied the petition for *certiorari* in *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), *cert. denied*, 59 U.S.L.W. 3946 (U.S. June 25, 1991). The Texas supreme court decided *Cathey* the same day it decided this case. The court applied *Cathey* and held that Erbauer's claims relate to an employee benefit plan and are preempted by ERISA (A. 3). Because the issues raised by Erbauer's petition involve matters of law well-settled by prior decisions of this Court and do not involve conflicting state or federal decisions, the petition should be denied.

A. The Judgment of the Supreme Court of Texas Comports with Well-Settled Decisions of this Court on ERISA Preemption

In *Cathey v. Metropolitan Life Ins. Co.*, the foundation of the decision in this case, the Texas supreme court relied on the well-settled decisions of this Court that all suits alleging improper claims processing relating to an

employee benefit plan be governed only by ERISA. 805 S.W.2d at 391, *citing Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 485 (1990) and *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 52-54 (1987). Erbauer sued Pan American for its processing of Dewey Gill's employee benefit claim (Tr. 114). The supreme court properly held that ERISA pre-empted Erbauer's claim against Pan American (A. 3).

Federal law preempts state law when the federal statute contains a provision expressly preempting state law. *Ingersoll-Rand v. McClendon,* 111 S.Ct. at 482. Federal law preempts state law if the latter conflicts directly with an ERISA cause of action. *Ingersoll-Rand,* 111 S.Ct. at 484-85. Federal law also preempts state law to the extent state and federal law actually conflict. *Wisconsin Public Intervenor v. Mortier,* 59 U.S.L.W. 4755, 4757 (U.S. June 21, 1991). All three types of federal preemption exist in this case.

ERISA expressly preempts all state laws that "relate to" an employee benefit plan. 29 U.S.C. § 1144(a)(1988). A law "relates to" an employee benefit plan if it has a connection or reference to such a plan. *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 96-97 (1983). A state law may "relate to" a benefit plan even if the law is not specifically designed to affect the plan or the effect is only indirect. *Ingersoll-Rand,* 111 S.Ct. at 483. Furthermore, ERISA pre-empts state laws relating to plans, rather than simply to plan benefits. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987).

Erbauer's causes of action indisputably "relate to" the employee benefit plan in this case. Erbauer alleged that Pan American was guilty of improperly processing

Dewey Gill's employee benefit claim (Tr. 114). Erbauer admitted in open court that its claims were identical to Gill's claims except for the damages it sought to recover (S.F. 7). Erbauer's causes of action against Pan American can be decided only after a court first determines the employee's entitlement to benefits and Pan American's interpretation and administration of the plan. Because Erbauer's cause of action against Pan American exists solely because of the presence of an employee benefit plan, Erbauer's cause of action necessarily relates to the plan. In fact, Erbauer has not challenged this finding of the Texas supreme court.

The second type of federal preemption, a conflict between a state cause of action and an ERISA cause of action, also exists in this case. Erbauer's state law claims conflict with ERISA's causes of action for improper claims processing. The civil enforcement portion of ERISA, 29 U.S.C. § 1132, does not permit the recovery of extra-contractual damages for the improper processing of a benefit claim. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 51-57; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985); *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d at 391. Furthermore, as outlined below, Erbauer's state law claims conflict directly with the ERISA causes of action available to entities like Erbauer. *Infra* at 13-15.

The third type of federal preemption, conflicting state and federal law, is present in this case. Federal law preempts state law when the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Erbauer's state law claims for extracontractual damages conflict directly with 29 U.S.C.

§ 1103(c)(1)(1985). Section 1103(c)(1) provides that the assets of an employee benefit plan shall never inure to the benefit of any employer. Because Erbauer did not establish a trust under section 1103(a), the assets of this employee benefit plan are the assets of Pan American. 29 U.S.C. § 1103(b)(2)(1985). ERISA must preempt Erbauer's state law claims in order that the plan assets be held "for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries . . . " 29 U.S.C. § 1103(c)(1)(1985).

The federal-preemption doctrine does not require that a party must have a cause of action under federal law in order for state law to be preempted. Justice Brennan, writing for a unanimous court in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), rejected the court of appeals' conclusion that complete preemption, permitting a litigant to remove a case to federal court, does not occur unless the federal cause of action relied upon provides the plaintiff with a remedy. Justice Brennan noted that the lower court's analysis was squarely contradicted by *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), where the court stated:

> The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy.

Williams, 482 U.S. at 391, n. 4 *citing Avco Corp.*, 390 U.S. at 561.

The nature of the relief available to Erbauer after jurisdiction attaches was not before the Texas supreme

court because it lacked jurisdiction to adjudicate the controversy. Furthermore, this Court's recognition in *Ingersoll-Rand* of "express preemption" as one type of federal preemption would be superfluous if a party must have an ERISA cause of action in order for ERISA to preempt state laws relating to employee benefit plans. In that regard, Erbauer's argument is moot because its petition does not challenge the Texas supreme court's finding that Erbauer's claim "relates to" an employee benefit plan and is therefore "expressly preempted" by ERISA.

Erbauer's reliance on *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656 (1954) is misplaced. *Laburnum* involved a claim of implied preemption under the authority of *Garner v. Teamsters C. & H. Local Union*, 346 U.S. 485 (1953). Unlike ERISA, the Labor Management Relations Act involved in *Laburnum* did not contain a provision expressly preempting state laws. Express preemption, as described by this Court in *Ingersoll-Rand*, does not require the existence of a substitute federal cause of action.

Laburnum concerned the *scope* of preemption under the Labor Management Relations Act as opposed to the *nature* of that preemption. *Longshoremen v. Davis*, 476 U.S. 380, 393 (1986). The Labor Management Relations Act did not preempt the plaintiff's suit in *Laburnum* because the regulated activity was a "merely peripheral concern" of the act. *See, San Diego Buildings Trade Council v. Garmon*, 359 U.S. 236, 243-44 (1959). In contrast, the need for uniformity of law concerning claims processing of employee benefit claims is at the heart of ERISA. *Pilot Life*, 481 U.S. at 54. As this Court recognized in *Ingersoll-Rand*:

> It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

111 S.Ct. at 484.

Unlike ERISA, Congress intended to preserve existing state law remedies for illegal union picketing when it passed the Labor Management Relations Act. *Laburnum*, 347 U.S. at 668-69. In contrast, Congress intended to limit the remedies available for improper claims processing of benefit claims to those contained within ERISA. As this Court noted in *Pilot Life*:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.

481 U.S. at 54.

The well-settled decisions of this Court support the judgment of the Texas supreme court and reject Erbauer's arguments. Under *Ingersoll-Rand* and *Pilot Life*, ERISA expressly and impliedly preempts Erbauer's state law causes of action. Erbauer's petition should be denied.

B. The Judgment of the Texas Supreme Court Does Not Conflict with the Decisions of the United States Courts of Appeals or State Courts of Last Resort

Erbauer's petition fails to raise a legitimate conflict between the Texas supreme court's judgment and other state or federal courts. Like every other argument Erbauer asserts, its claim of conflicting decisions rests upon the false premise that the judgment of the Texas supreme court leaves Erbauer without a remedy under ERISA. The judgment cannot conflict with the cases cited by Erbauer when the supreme court did not address the issue of Erbauer's standing to sue under ERISA. Furthermore, the judgment preempting Erbauer's state law causes of action comports with other state and federal courts that have considered claims similar to those alleged by Erbauer.

None of the five cases cited on pages 9-10 of Erbauer's petition conflict with the judgment of the Texas supreme court. *Pressroom Unions Fund v. Continental Assurance*, 700 F.2d 889 (2d Cir. 1983), *Provident Life and Accidental Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990) and *Great Lakes Steel Division of National Steel Corp. v. Deggendorf*, 716 F.2d 1101 (6th Cir. 1983) all concerned attempts by employers to maintain an implied cause of action under 29 U.S.C. § 1132. Two of the courts held the employers in those cases had standing to sue as fiduciaries. *Waller*, 906 F.2d at 988, n. 5; *Deggendorf*, 716 F.2d at 1104-05. *Pressroom Union Fund* did not discuss ERISA preemption.

In *Memorial Hospital System v. Northbrook Ins. Co.*, 904 F.2d 236 (5th Cir. 1990), the court recognized that ERISA

preemption occurs when the state law claims involve allegations such as improper claims processing and the claims directly affect the relationship among the traditional ERISA entities – *the employer,* the plan and its fiduciaries and the participants and beneficiaries. 904 F.2d at 245 (emphasis added). Erbauer sued Pan American for its alleged improper processing of Dewey Gill's benefit claim (Tr. 114). In *Hermann Hospital v. MEBA Medical & Benefits Plan,* 846 F.2d 1286 (5th Cir. 1988), the court recognized:

> Adopting Hermann's position would allow parties that lack standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). *This is an untenable result.*

845 F.2d at 1290 (emphasis added). Instead of conflicting with the judgment, the cases cited by Erbauer support the finding that ERISA preempts Erbauer's claim.

The judgment of the Texas supreme court also does not conflict with the decisions of other courts holding that ERISA preempts the type of causes of action asserted by Erbauer. Erbauer alleged extracontractual damages on the theories of breach of contract, breach of the duty of good faith and fair dealing, the Texas Deceptive Trade Practices Act and the Texas Insurance Code. ERISA preempts these claims. *See Pilot Life,* 481 U.S. at 51-57; *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985); *Kanne v. Connecticut Gen. Life Ins. Co.,* 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied,* 109 S.Ct. 3216 (1989); *In re Life Ins. Co. of N. Am.,* 857 F.2d 1190, 1194 (8th Cir. 1988); *Anshultz v. Connecticut Gen. Life Ins. Co.,* 850 F.2d 1467,

1469 (11th Cir. 1988); *Cathey*, 805 S.W.2d at 391; *Commercial Life Ins. Co. v. Superior Court*, 47 Cal.3d 473, 253 Cal. Rptr. 682, 764 P.2d 1059 (1988), *cert. denied sub nom. Juliano v. Commercial Life Ins. Co.*, 490 U.S. 1075 (1989).

Because it was without jurisdiction to consider the question, the Texas supreme court did not decide whether or not Erbauer has standing to sue under ERISA. Nevertheless, other courts have held that ERISA preempts the claims of entities similarly situated to Erbauer. In *Provident Life & Acc. Ins. Co. v. Waller*, the court held that a "plan administrator" has standing to sue as a fiduciary under 29 U.S.C. § 1132(a)(3). 906 F.2d at 988, n. 5. Because Erbauer was the only employer to establish or maintain the employee benefit plan (PX 10), Erbauer is a "plan sponsor" under ERISA. 29 U.S.C. § 1002(16)(B)(i)(1985). Because the employee benefit plan in this case does not specifically designate the administrator (PX 10), Erbauer, as the plan sponsor, is the "plan administrator". 29 U.S.C. § 1002(16)(A)(ii)(1985). Accordingly, Erbauer is a fiduciary under ERISA. *See also, U.S. Steel Mining Co. v. District 17, United Mine Workers of America*, 897 F.2d 149 (4th Cir. 1990) (plan administrator is a fiduciary; employer also is a fiduciary when it arranged for plan to continue medical insurance coverage).

In *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir. 1986), the plaintiff-employer adopted an employee benefit plan with benefits to be paid by the defendant-insurer. When the insurer withdrew from writing insurance for the plan, the employer sued to require the insurer to continue to provide benefits under the plan. The court held the employer could be considered a fiduciary because, like Erbauer, the employer had the

power to select a new insurance company for the plan. 805 F.2d at 736.

In *Blatt v. Marshall & Lassman*, 812 F.2d 810 (2nd Cir. 1987), an accounting firm failed to deliver a notice of change form to the retirement committee until after a participant had left the firm, thereby unreasonably delaying the participant's receipt of benefits. The court held the accounting firm was an ERISA fiduciary who breached its duty to the plan participant by preventing or interfering with the participant's receipt of benefits to which he was entitled. 812 F.2d at 813. Dewey Gill sued Erbauer because Erbauer failed to comply with its responsibilities under the plan in providing the required information for employees to be enrolled with insurance coverage (PAX 1, S.F. 666, 673, 685; Tr. 129).

Erbauer's role in backdating the eligibility of certain employees for insurance coverage is similar to the action that resulted in employer being a fiduciary in *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180 (3rd Cir. 1985). In *Genter*, the employer permitted certain employees to increase insurance coverage contemporaneous with salary increases, even though the employee benefit plan required changes in the insurance coverage to occur on the annual anniversary date of the policy. The court held that the employer was the fiduciary because it accommodated certain employees with mid-stream increases not provided for in the terms of the plan. 776 F.2d at 1184.

ERISA also provides a remedy to Erbauer in its position as an administrator under 29 U.S.C. § 1132(k)(1985). Under this section, an administrator may bring suit in federal court against the secretary of labor to, among

other matters, compel the secretary to take action required under ERISA. Erbauer could have sued the secretary of labor in federal court to require the secretary to bring an action against Pan American to pay Dewey Gill, under the authority of 29 U.S.C. § 1132(a)(5)(1985). Erbauer, of course, made no attempt to pursue its remedies as either an administrator or a fiduciary.

Furthermore, ERISA preempts Erbauer's claims even if a court were to determine that Erbauer has no remedy under ERISA. The fact that giving preemptive effect to a federal statute would leave a party without a remedy does not mean that Congress did not intend to preempt state law. *Broughton v. Courtney*, 861 F.2d 639, 643 (11th Cir. 1988) (citing *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987). In fact, the courts to directly confront this issue have rejected Erbauer's argument that standing to sue under ERISA is a prerequisite for ERISA preemption. *See Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755 (5th Cir. 1990); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989); *Hermann Hospital v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988); *Pane v. Darden*, 763 F.Supp. 281, 283 (N.D. Ill. 1991) (claim preempted so long as it "relates to" employer-sponsored plan; preemption dependent on nature of plan involved, not plaintiff's "status" under that plan); *Carter v. Amax Coal Corp.*, 748 F.Supp. 812 (D. Utah 1990).[2]

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[2] Erbauer's statement on page 15 of the petition that "this Court has never found state law preempted in the absence of an alternative federal remedy" is untrue. *See, e.g., Caterpillar, Inc. v. Williams*, discussed *supra* at 7-8; *Chicago & N.W. Transp.*

(Continued on following page)

The judgment of the Texas supreme court does not conflict with any case cited in Erbauer's petition. It does not conflict with the federal and state courts holding that ERISA preempts the type of claims made by Erbauer. The judgment does not conflict with federal circuit cases holding that ERISA preempts the claims of entities similarly situated to Erbauer. In short, Erbauer's petition raises no special or important issues for this court to consider.

II. ERISA PREEMPTION IN THIS CASE DOES NOT DENY ERBAUER ANY CONSTITUTIONAL RIGHT OF ACCESS.

Erbauer again bases its constitutional "right of access" argument on the flawed premise that the Texas supreme court determined that Erbauer has no remedy under ERISA. Because the Texas supreme court did not decide that issue, Erbauer's petition should be denied. Furthermore, Erbauer has not been denied any substantive due process "right of access."

Erbauer's petition cites three provisions of the United States Constitution allegedly providing to Erbauer a "right of access": the privileges and immunities clause

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Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (Interstate Commerce Act preempts shipper's injunction suit under state law even though shipper lacked any remedy under federal law); *Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525, 535 (1959) (Federal Communications Act preempts state law libel suit for damages against radio station, leaving plaintiff without any remedy).

of Article IV, the First Amendment and the due process clause of the Fourteenth Amendment. None of these three constitutional provisions guarantee Erbauer a right to sue Pan American for monetary damages.

The privileges and immunities clause of Article IV of the United States Constitution does not apply to Erbauer because Erbauer is a corporation. *Paul v. Virginia*, 75 U.S. 168 (1869). The Open Access Clause of the First Amendment (providing citizens with the right to redress grievances) focuses on procedural impediments to the exercise of existing rights and does not prevent a court from holding that a plaintiff has no remedy at law for the injuries he may allege. *Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990).

Erbauer's petition also fails to raise a colorable argument under the due process clause of the Fourteenth Amendment. A prerequisite to a showing of a due process violation under the Fourteenth Amendment is conduct characterized as "state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Although the judges of the Texas supreme court can be considered "state actors," they were not acting "under color of state law," the legal equivalent of "state action." The judges of the Texas supreme court applied federal law, not state law, to preempt Erbauer's state law claims. A state official who applies federal law to determine a person's claim acts under color of federal law, not state law. *Ellis v. Blum*, 643 F.2d 68, 83 n. 17 (2nd Cir. 1981). Because the judgment of the Texas supreme court applying ERISA does not constitute "state action," the due process clause of the Fourteenth Amendment does not apply.

Moreover, a determination that ERISA preempts Erbauer's claims without leaving Erbauer a remedy under ERISA (a finding no court has made) would not violate any substantive due process "right of access." There is no federal constitutional requirement that a federal law cutting off state remedies either duplicate recovery at common law or provide a reasonable substitute remedy. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1978). Acts of Congress adjusting the burdens and benefits of economic life have a presumption of constitutionality and the burden is on one complaining of a due process violation to establish that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). ERISA preemption of state health insurance laws does not violate the due process clause. *Standard Oil Co. of California v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

Congress intended that all suits alleging improper claims processing relating to employee benefit plans be governed only by ERISA. *Pilot Life*, 481 U.S. at 52-54. Congress intended to limit the type of remedies available for improper claims processing to those contained within 29 U.S.C. § 1132. *Pilot Life*, 481 U.S. at 54. Congress intended that the assets of an employee benefit plan should never inure to the benefit of any employer. 29 U.S.C. § 1103(c)(1)(1985). It is inconceivable that Congress, acting with those intentions, also intended for employers such as Erbauer to have a right to recover unlimited actual and punitive damages to be paid from

the assets of the plan when the participants and beneficiaries of that plan would be limited to the remedies provided in section 1132. Not only is there a rational basis to the ERISA civil enforcement scheme, to adopt Erbauer's position would be totally irrational and inconsistent with the intentions of Congress.

CONCLUSION

The questions that Petitioner raises are neither special nor important. The judgment of the Texas supreme court involves no unsettled questions of law and is entirely consistent with the prior rulings of this Court and other federal circuit courts and state courts of last resort on ERISA preemption. ERISA preemption in this case does not violate any right of access under the United States Constitution. Accordingly, the petition should be denied.

Respectfully submitted,

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